

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**PETER M WILCOX**  
Claimant

**APPEAL NO. 10A-UI-06040-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**VAN DIEST SUPPLY CO**  
Employer

**OC: 03/07/10**  
**Claimant: Respondent (2-R)**

Section 96.5(2)a – Discharge

**STATEMENT OF THE CASE:**

The employer, Van Diest Supply Company (Van Diest), filed an appeal from a decision dated April 14, 2010, reference 01. The decision allowed benefits to the claimant, Peter Wilcox. After due notice was issued, a hearing was held by telephone conference call on June 10, 2010. The claimant participated on his own behalf. The employer participated by Director of Manufacturing Clark Vold and Bulk Terminal Manager Jamie Severson. Exhibits One and Two were admitted into the record.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Peter Wilcox was employed by Van Diest from November 12, 2003 until March 8, 2010 as a full-time shipping and receiving operator. He received a copy of the employer's personnel policies and was aware of the progressive disciplinary procedures.

The claimant's job responsibilities involved monitoring the transfer of liquid chemicals from tanker trucks into storage containers and vice versa. In July 2009 he received a written warning for overfilling a compartment on a tanker truck, resulting in product loss of \$720.00 value.

On March 4, 2010, he was monitoring a transfer of chemicals from a tanker truck to a storage tank. His supervisor had designated two storage tanks to take the load because the amount of the product in the tanker might be more than one storage tank could handle. It was Mr. Wilcox's responsibility to monitor the pumping to make sure no spill occurred.

Instead of standing on or by the tank to visually check the level of the fluid, he left the area and a spill of 200 gallons occurred because he did not switch the pumping to the second storage tank. He was outside the building even though he knew the initial storage tank was getting close to being full.

The employer investigated the incident and reviewed the claimant's disciplinary history. The company policy calls for immediate discharge of any employee who has two incidents in a

one-year period where the accidents are the result of failing to follow company procedures. It was determined the claimant had not followed procedure by not directly, visually monitoring the amount of chemical going into the storage tank. He was notified on Monday, March 8, 2010, he was discharged.

Peter Wilcox has received unemployment benefits since filing a claim with an effective date of March 7, 2010.

#### **REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

The claimant had received the employer's personnel policies and knew his job was in jeopardy as a result of the spill in July 2009 if he was found responsible for any other incidents within a one-year period. In spite of this he did not closely monitor the operation on March 4, 2010, and left the immediate area of the storage tank when he knew it was getting close to being full and that it might not be large enough to take the entire cargo of the tanker truck. As a result of this failure to follow procedure there was a spill of 200 gallons of chemical. This endangered the safety of other employees and resulted in a financial loss to the employer. This is a violation of the duties and responsibilities the employer has the right to expect of an employee and conduct not in the best interests of the employer.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

**DECISION:**

The representative's decision of April 14, 2010, reference 01, is reversed. Peter Wilcox is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

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